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MICHAEL RODAK, J

No. 72-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

## 72-488

TEXAS GAS TRANSMISSION CORPORATION,
*Petitioner,*

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Texas Gas Transmission Corporation (Texas Gas) hereby petitions for a writ of certiorari to review that portion of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in *Memphis Light, Gas and Water Division* v. *Federal Power Commission* on February 18, 1972, setting aside the Commission's order permitting Texas Gas to change, for rate making purposes, its method of tax depreciation from liberalized depreciation with flow-through for its existing properties.

## OPINIONS BELOW

The initial opinion of the Court of Appeals and its opinion on rehearing are not yet reported but are set forth in Appendix A and B respectively in the Petition being filed by the Solicitor General of the United States on behalf of the Federal Power Commission (FPC Petition). The initial opinion (Opinion No. 578) of the Federal Power Commission (R. pp. 100-111), and its opinion on rehearing (Opinion No. 578-A, R. pp. 145-149) are reported at 43 FPC 824 and 44 FPC 140, respectively, and are set forth in FPC's Petition as Appendix D and Appendix E, respectively.

## JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1972 (FPC Petition, Appendix C). Petitions for rehearing filed by the Commission and Texas Gas were denied on May 11, 1972. On August 4, 1972, the Chief Justice extended the time for filing a petition for writ of certiorari to and including September 23, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

## STATUTE INVOLVED

Section 441 of the Tax Reform Act of 1969, 83 Stat. 487, *et seq.*, 26 U.S.C. § 167(1) are set forth in the FPC Petition at Appendix F.

## QUESTION PRESENTED

Whether Congress intended by Section 441 of the Tax Reform Act of 1969, to withdraw from the Federal Power Commission (and other agencies charged with similar regulatory responsibilities) the authority and

discretion to permit a utility to change, for rate-making purposes, its method of tax depreciation for existing property from liberalized depreciation with flow-through to liberalized depreciation with normalization or straight-line depreciation.[1]

## STATEMENT

### A. Background

Prior to the enactment of Section 167 of the Internal Revenue Code of 1954, 68A Stat. 51, the Commission had usually used the straight-line depreciation method for determining federal income tax expense. Under this method, annual depreciation is uniform over the asset's life. Section 167 authorized taxpayers to compute tax depreciation, in addition to straight-line, by one of several accelerated or "liberalized" depreciation methods. Under any of these liberalized methods, annual depreciation is higher in the asset's early years and lower in its later years than under the straight-line method, and conversely, the federal income tax expense is lower in the early years and higher in the later years. Under all the depreciation methods here involved—straight-line and liberalized—the aggregate tax depreciation over the life of an asset never exceeds its total depreciable value.[2]

In enacting Section 167, the Congress intended to increase available working capital for all segments of the American economy to assist in the modernization and expansion of industrial capacity. H. Rept. 1337,

---

[1] The terms "existing property"; "expansion property"; "flow-through" and "normalization" as used in this Petition are the same as described in the FPC Petition.

[2] There is no question here with regard to book depreciation which still is largely determined on the straight-line method.

83d Cong.; S. Rept. 1662, 83d Cong., *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 316 F.2d 659, 662 (D.C. Cir. 1963).

In the early years following the enactment of Section 167, the Commission determined that the use of liberalized depreciation resulted in a tax deferral, and that the income tax expense allowed in the cost of service should be "normalized" for rate purposes, *i.e.*, the income tax allowed should be computed on the basis of straight-line depreciation and the difference between the taxes thus computed and the actual taxes payable under liberalized depreciation should be kept in a reserve account to be available, as needed, to pay the higher income taxes of later years. See, *e.g.*, *Amere Gas Utilities Co.*, 15 FPC 760, 781 (1956). In so doing the Commission reasoned that present rate payers would not benefit at the expense of future rate payers, and *vice versa*. This Commission position was affirmed by the Fourth Circuit as being a matter within the Commission's special expertise. See e.g., *City of Lexington* v. *F.P.C.*, 295 F.2d 109, 114 (4th Cir. 1961).

Several years later (1964), after its membership had changed substantially, the Commission (3-2) reversed this earlier decision by finding that the utilization of liberalized depreciation generally resulted in a permanent tax savings and directed that these "savings" should flow-through to the customers, in the form of reduced rates. *Alabama-Tennessee Natural Gas Co.*, 31 FPC 208 (1964) affirmed *sub nom.*, *Alabama-Tennessee Natural Gas Co.* v. *F.P.C.*, 359 F.2d 318 (5th Cir., 1966), *cert. denied* 385 U.S. 847.

Two years later (1966), the Commission (3-2) decided that, for rate purposes, it would impute the use of liberalized tax depreciation to any company which

shifted from liberalized depreciation to straight line depreciation and would flow through the resulting imputed tax "savings" to the rate-payers. See *Midwestern Gas Transmission Co.*, 36 FPC 61 (1966), affirmed, 388 F.2d 444 (7th Cir., 1968), *cert. denied*, 392 U.S. 928.

The courts, in all three cases, recognized that the regulation of the tax depreciation policies followed by jurisdictional companies for rate purposes lay within the Commission's discretion.[8]

As we will show below, with the passage of the Tax Reform Act of 1969, a vital premise of the Commission's flow-through policy disappeared; the tax reduction ceased to be a "saving" and became a mere deferral.

**B. Section 441(a) of the Tax Reform Act of 1969.**

The legislative history, as well as the language of Section 441(a), establishes the real concern which the Congress had, over the loss of tax revenues as a result of the actions taken, or threatened, by regulatory agencies in the rate treatment of liberalized depreciation. As stated by the House Committee (H. Rep. No. 91-413; Part I, 91st Cong., 1st Sess., p. 132):

> "Your committee has been advised that, if those trends were to continue, there could very shortly be a revenue loss of approximately $1.5 billion; some estimates indicate that the loss might be con-

[8] The Commission has consistently regarded the treatment of liberalized depreciation in a regulatory context as a matter of administrative discretion. See, *e.g.*, *Alabama-Tennessee Natural Gas Co.*, 31 FPC at 216; *Natural Gas Pipeline Co.*, 33 FPC 574, 578 (1965), vacated on other grounds *sub nom. City of Chicago* v. *F.P.C.*, 385 F.2d 629 (D.C. Cir. 1967), *cert. denied sub nom. P.S.C. of Wisconsin* v. *F.P.C.*, 390 U.S. 945 (1968).

siderably closer to $2 billion per year. Your Committee has determined that the likely revenue loss from wholesale shifts to accelerated depreciation and flow-through is unacceptable at this time."

In order to forestall this continuing loss of tax revenues, the House Ways and Means Committee proposed and the House adopted the following three general rules (*id.* at 133):

> "(1) If straight line depreciation is presently being taken, then no faster depreciation is to be permitted as to that property.
>
> (2) If the taxpayer is taking accelerated depreciation and is "normalizing" its deferred taxes, then it must go to the straight line method unless it continues to normalize as to that property.
>
> (3) If the taxpayer is taking accelerated depreciation and flowing through to its customers the benefits of the deferred taxes, then the taxpayer must continue to do so, unless the appropriate regulatory agency permits a change as to that property."

These same three rules were proposed by the Senate Committee and adopted by the Senate:

> "Both the House bill and the committee amendments provide that in the case of existing property the following rules are to apply:
>
> (1) If straight line depreciation is presently being taken, then no faster depreciation is to be permitted as to that property.
>
> (2) If the taxpayer is taking accelerated depreciation and is "normalizing" its deferred taxes, then it must shift to the straight line method unless it continues to normalize as to that property.
>
> (3) If the taxpayer is taking accelerated depreciation and flowing through to its cus-

tomers the benefits of the deferred taxes, then the taxpayer would continue to do so (except as provided under the committee amendments which are discussed below), unless the appropriate regulatory agency permits a change as to that property.

Both versions of the bill in the case of new property have the effect that if the taxpayer presently flows through to its customers the benefits of deferred taxation, then it would stay on accelerated depreciation and flow through unless the regulatory agency permits it to change (or unless the exception under the committee amendments pointed out below applies)."[4]

The Senate Finance Committee, however, provided a *supplemental* privilege to regulated utilities by way of an election, with respect to *existing* as well as *new* property, which was not available under the House version (*id.* at 173):

"The Committee amendments, while in most respects the same as the House provisions, differ in one principal area. The amendments permit an election to be made within 180 days after the date of enactment of the bill for a utility covered by this provision to shift from the flow-through to the straightline method, *with or without the permission of the appropriate regulatory agency,* or permit it with the permission of the regulatory agency to shift to the normalization method (that is, to come under general rules of the bill)."[4] (Emphasis supplied)

The Conference Committee made no changes in the general rules. However, it did revise the election provided in the Senate bill to exclude existing properties from

[4] S. Rept. No. 91-552 91st Cong. 1st Sess. 172-73.

its coverage. See H. Rep. No. 91-782, 91st Cong., 1st Sess., pp. 150-154, 312-313.

**C. The Proceedings Before the Commission**

Prior to the enactment of the Tax Reform Act of 1969, Texas Gas, like most of the utilities regulated by the Commission, and under compulsion of *Alabama-Tennessee* and *Midwestern, supra,* was utilizing liberalized depreciation with flow-through. Also prior to the passage of the Tax Reform Act, Texas Gas filed, pursuant to Section 4(e) of the Natural Gas Act 15 U.S.C. § 717 c (e), a proposal to increase its rates which *inter alia* would permit it to recover the increased taxes associated with its request to return to a straight-line method of tax depreciation with respect to *all* of its qualified property. (R. 1399)

After the passage of the Tax Reform Act and during the course of the above described rate proceeding, Texas Gas advised the Commission of its intent to exercise the election provided in Section 441 and to use, with Commission permission, liberalized income tax depreciation with normalization for its *expansion* properties. However, Texas Gas requested Commission assurance, before it made the election, that it would be permitted to change to straight line, or alternatively and preferably, to normalization for its *existing* properties. If it made the election without such assurance, the Company urged, it would be confronted with a continual loss of income tax depreciation deductions, necessitating further and repeated applications for rate increases (R. 2694-5). In May, 1970, the Commission issued Order No. 404, 43 FPC 740, announcing its intention to permit companies subject to its regulation which invoked the election to use liberalized depreciation with normalization for the expansion properties.

In Opinion No. 578, issued on June 3, 1970, the Commission granted the Company permission to shift to normalization for the rest of its properties (FPC Petition, Appendix D). The Commission pointed out that its premise in *Alabama-Tennessee, supra,* that the use of liberalized depreciation resulted in permanent tax savings for companies with growing or stable plant, was no longer valid for companies, such as Texas Gas, which had elected to abandon flow-through for their expansion properties (*Id.* p. 62). As a result, the Commission found that requiring Texas Gas, nevertheless, to continue to use flow-through for its existing properties would result in the Company's tax component increasing constantly with a resulting continual need for increased rates (FPC Petition, App. D, pp. 63-64).

Accordingly, the Commission concluded that permitting Texas Gas, in such circumstances, to shift to normalization for its existing properties offered "more hope for stability of rates for its customers and more assurance that the company can earn its fair rate of return without future rate increases" (FPC Petition, App. D, p. 63). In addition, the Commission required Texas Gas to place the difference between the taxes due and the taxes allowed as a result of using normalization in a special reserve which would be excluded from the rate base on which the return allowed is computed with the result that the consumers would share in the benefits of normalization (FPC Petition App. D, p. 63).

Thereafter, on June 8, 1970, Texas Gas exercised its election not to have flow-through apply to its expansion property and commenced normalization of the tax expenses on all of its utility property as of January 1, 1970. The normalized taxes have been collected in Texas Gas' rates since January 12, 1970.

**D. The Decision of the Court Below**

The court below affirmed the Commission's action in Order No. 404 permitting companies on flow-through to use normalization for expansion properties (FPC Petition, App. A, pp. 20-29).[5] However, it set aside the Commission's action in Opinion No. 578 permitting Texas Gas to change to normalization for its existing properties holding that Texas Gas "... is specifically prohibited, under the final version of the bill ..." from abandoning flow through. (FPC Petition, App. A, p. 34). This is the keystone finding of the court's conclusion. It is based upon the premise that, in the final version of the Tax Reform Act of 1969, the Federal Power Commission lost its discretion to permit a regulated utility to switch from flow-through to normalization for rate-making purposes.

The court below expressly recognized that, under the House version of the Tax Reform Act, the Commission was "clearly justified" in permitting Texas Gas to change from flow-through to normalization:

> "Thus, under the House version of the bill, Texas Gas, since it had been using accelerated depreciation with flow-through, would have been required to continue doing so with respect to its 'existing' (including replacement) property unless the Commission permitted otherwise. If this had been the law enacted, the Commission's and Texas Gas' position here would have been clearly justified...." (FPC Petition, App. A. p. 32)

However, the court reasoned that the election provided by the Senate, and later limited by the Conference Committee to expansion property, eliminated the discretion with respect to existing property, which was built into

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[5] This is the subject of the Petition in No. 72-96 in which Texas Gas and the Solicitor General have filed briefs in opposition.

the House version, despite the clear language of the Senate Report which emphatically demonstrates that the Senate bill kept the core of the House bill intact:

> "Both the House bill and the committee amendments provide that in the case of existing property, the following rules are to apply:
>
> * * *
>
> "(3) If the taxpayer is taking accelerated depreciation and flowing through to its customers the benefits of the deferred taxes, then the taxpayer would continue to do so (except as provided under the committee amendments which are discussed below), *unless the appropriate regulatory agency permits a change as to that property.*" (*Emphasis supplied*) [6]

## REASONS FOR GRANTING THE WRIT

1. The holding of the Court of Appeals that Section 441 of the 1969 Tax Reform Act operates to withdraw the Commission's authority to permit Texas Gas to change from flow-through to other methods of tax depreciation for its existing properties is, we submit, based on a gross misreading of that Section and its legislative history, which, if not corrected by this Court, may have important and far-reaching consequences.

The decision may have effects far beyond the wholesale gas and electric business regulated by the Commission. The provisions of Section 441(a)(3)(A) are to apply to all properties used predominantly in the trade or business of the furnishing or sale of:

(a) electrical energy, water, or sewage disposal services;

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[6] S. Rep. No. 91-552 [To Accompany H.R. 13270] 91st Cong., 1st Sess. 172-73. The parenthetical phrase clearly refers to the 180-day election which was a separate, distinct and additional option being proposed by the Senate.

(b) steam or gas through local distribution systems;

(c) telephone services and other communication services if furnished or sold by Comsat; and

(d) transportation of gas or steam by pipeline.

The court's holding could thus operate to withdraw authority to permit changes from flow-through by all regulatory agencies, *state* as well as *federal,* having jurisdiction over the rates of companies engaged in the businesses listed above.

Further, the court's holding would substitute a flat rule permitting, at most, only very limited exceptions in an area which traditionally has been accepted as properly one for exercise of agency expertise. As a result, it would make it difficult, if not impossible, for the Comission to make the appropriate *ad hoc* adjustments which, in its view, may be called for, particularly in the natural gas industry where there is an urgent need to stimulate the development of ways and means of alleviating the present critical shortage of natural gas.[7] In addition, the court's decision would frustrate, in large measure, the express Congressional intent underlying Section 441 to reduce the future losses of tax revenues resulting from the recent trends of regulatory agencies to change to flow-through.

[7] Under the double-declining balance method of liberalized depreciation, a point of time is reached where it becomes more economic to revert to a straight-line method of tax depreciation. This is commonly referred to as the "cross-over point." Under the decision of the court below, regulated utilities on flow-through would be prohibited from abandoning liberalized depreciation despite the fact that all would agree that the cross-over point had been reached and that the change to a straight-line method would be in the public interest.

Also, the court's holding would mean that companies, which exercised the election to shift to normalization for their expansion properties, would be confronted with a substantial and continual reduction in tax depreciation necessitating repeated applications for rate increases and resulting rate instability for their customers. And since all but two of the natural gas pipeline companies on flow-through exercised this right of election, the increased number of rate filings would aggravate the Commission's already heavy administrative burdens.

2. In concluding that Section 441 of the 1969 Tax Reform Act withdrew authority from the regulatory agencies to permit utilities on flow-through to change to other methods of tax depreciation, the court below misread the Senate Committee Report. As discussed earlier herein, the Senate version did not propose to limit agency discretion to permit companies on flow-through to change to straight-line or nomalization. To the contrary, the Senate Committee accepted the third general rule as set out in the House version. It undertook, *in addition,* to provide a right of election for companies on flow-through.[8]

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[8] Accordingly, since the House and Senate versions were in agreement on the third general rule for companies of flow-through, and their disagreement extended only to the additional right of election for these companies proposed by the Senate, the Conference Committee refrained, as it was required to do (See Section 136 of the Legislative Reorganization Act of 1946, 2 U.S.C. 190c(a)), from revising the provisions relating to the general rule and limited its revision to only the separate right of election. See General Explanation of the Tax Reform Act of 1969, H. R. 13290, 91st Cong., Public Law 91-172, prepared by the Staff of the Joint Committee on Internal Revenue Taxation, p. 153.

Thus, the Senate Committee Report explicitly points out that its "committee amendments" parallel "the House bill" in providing:

> "that in the case of existing property, the following rules are to apply:
>
> * * * *
>
> "(3) If the taxpayer is taking accelerated depreciation and flowing through to its customers the benefits of the deferred taxes, then the taxpayer would continue to do so (except as provided under the committee amendments which are discussed below), unless the appropriate regulatory agency permits a change as to that property." (S. Rep. No. 91-552, *supra*, at pp. 172-173).

Continuing, the Senate Report goes on to describe the proposed election as a "differ[ence] in one principal area" (S. Rep. No. 91-552, *supra*, at p. 173), with the difference, we submit, being the absence from the House bill of a provision granting a similar right of election.

Contrary to the court below (FPC Petition, App. B. pp. 43-46), the election which the Senate thus proposed to grant to utilities on flow-through (S. Rep. No. 91-552, *supra*, at p. 173) did not consist of two separate and distinct alternatives. Rather, the two alternatives were mutually-interdependent parts of a single package designed to exert pressure on the regulatory agencies to permit utilities on flow-through to change to normalization by putting them on notice that if they refused permission for changes to normalization, the utility could nevertheless change to straight-line *without their permission*. The proposed election was thus different from the third general rule which requires *agency permission* before a utility on flow-

through could change *either* to normalization *or* to straight-line.

Construing the Senate Report as intending the proposed election as an *addition* to, rather than as a *substitute* for, the third general rule for utilities on flow-through, removes the ambiguity which would otherwise arise from the parenthetical phrase ("except as provided under the committee amendments which are discussed below") included in the Senate description of the third general rule (*supra*, pp. 6, 7). And it serves to explain why neither the Conference Committee Report nor the managers of the bill in both Houses undertook to offer any justification for the drastic change in the legislation (as found by the Court below) as their responsibilities required, had the Court-determined result in fact been intended.

3. Finally, the conclusion of the court below is not supported by the Congressional intent "in general to freeze" the existing situation regarding methods of depreciation (FPC Petition, App. A, pp. 34-36). This general characterization was not intended to supersede the three general rules *expressly* provided both by the House and by the Senate.

In addition, the court's conclusion in this respect would appear to be self-contradictory. As heretofore indicated (p. 10), the court has found that the Commission's action would have been completely justified under the House version of the Tax Reform Act, even though the "freeze" language, upon which the Court relies, was contained in the accompanying House Report. It is perfectly understandable that the House Committee would describe the restrictions which it was

placing upon regulatory agencies as an action ". . . . in general to 'freeze' the current situation . . .". It is quite a different thing, however, to construe such language to mean a "complete freeze" as did the court below. Such a construction completely ignores and nullifies the Congressional intent as clearly expressed in the three general rules.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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